

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
THOUSAND ISLAND CLUB, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1985	:	
through November 30, 1985.	:	

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Petitioner, Thousand Island Club, Inc., 551 East Genesee Street, Fayetteville, New York 13066, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1985 through November 30, 1985 (File No. 804091).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York, on January 14, 1988 at 9:15 A.M., with all briefs to be filed by February 11, 1988. Petitioner appeared by its treasurer, Robert D. Hall, C.P.A. The Audit Division appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the penalties and interest in excess of the minimum, which were imposed against petitioner, should be waived.

FINDINGS OF FACT

1. On January 17, 1986, petitioner, Thousand Island Club, Inc., filed a New York State and Local Sales and Use Tax Return for the period September 1, 1985 through November 30, 1985. The return reported sales and use taxes due of \$15,315.79, plus a late filing charge of \$153.15, for an amount due of \$15,468.94. In conjunction with its return, petitioner remitted a check payable to "New York State Sales Tax" for the amount shown due on its return.

2. On May 5, 1986, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due for the period ending November 30, 1985. The notice calculated the amount due as follows:

				Amount Paid	Amount
<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	and/or <u>Credited</u>	Due	

\$15,315.79	\$1,781.29	\$279.57	\$15,472.38 <sup>1</sup>
\$1,904.27			

The penalty was imposed for the late payment of sales and use taxes.

3. During the period in issue, petitioner operated a lodging facility on Wellesley Island which is located across from Alexandria Bay, New York. Petitioner also operated a golf course and small restaurant at the same location. It entertained guests from approximately May 15th to October 15th and was closed the remainder of the year.

4. During the years 1984 and 1985, the sales and use tax returns were signed either by Mr. Robert Hall, as the corporation's treasurer; Mr. Paul Davis, as the general manager; or Ms. Elaine Michel, as the bookkeeper. However, the bookkeeper was responsible for preparing the returns under the supervision of the treasurer.

5. During the period in issue, petitioner's treasurer was a certified public accountant who worked in Syracuse, New York. Petitioner's treasurer did not receive any compensation for his work as treasurer and only became involved with petitioner's books and records on a quarterly basis in order to prepare withholding tax reports and quarterly financial statements.

6. In October 1985 petitioner's manager unexpectedly decided to leave the business on short notice. Consequently, some of the accounting work was left to be completed by the part-time bookkeeper. At or about this time, petitioner's treasurer attempted to contact the bookkeeper by telephone to determine if she had taken any action with respect to the sales tax return for the period ending November 30, 1985. However, he was unable to contact her and was advised by another individual that she had gone out of town on a trip.

7. When petitioner's treasurer went to the business premises to perform year-end accounting procedures and prepare the financial statements, he realized that the sales tax return for the period ending November 30, 1985 had not been filed. At this time, he prepared and remitted the return and an accompanying check. He also prepared and submitted a Tax Amnesty Application.

8. When petitioner began its activity, it was in the practice of filing sales and use tax returns on a quarterly basis. For the year 1985, the Audit Division determined that petitioner should file on a monthly basis. Initially, petitioner disagreed with the position and attempted to resolve the matter with the Audit Division. In the interim, petitioner continued to file on a quarterly basis. However, since monthly returns were either not filed or filed late, petitioner received assessments pertaining to the periods ending May 31, 1985 and August 31, 1985. Eventually, petitioner determined that it should file on a monthly basis and commenced doing so.

9. On May 17, 1985, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for the period ending February 28, 1985. The notice assessed an estimated amount of tax plus penalty and interest. On June 21, 1985, petitioner filed its return for the period ending February 1985. Since the return showed that no tax was due, the estimated delinquency assessment and penalty were cancelled.

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<sup>1</sup>No argument was raised or explanation provided as to why the amount paid and/or credited did not correspond with the remittance of January 17, 1986.

### SUMMARY OF THE PARTIES' POSITIONS

10. At the hearing, petitioner maintained that it should not be considered a chronic delinquent with respect to the filing of sales tax returns since it was not required to file a monthly report during those months it was not open. Petitioner also argued that there was difficulty in obtaining the proper records and that it made an effort to comply with the Tax Law. In opposition to the petition, the Audit Division argued that petitioner has been a chronic delinquent in the filing of its returns, and that petitioner has not demonstrated reasonable cause for the abatement of penalties.

### CONCLUSIONS OF LAW

A. That Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty for failure to file a return or to pay or to pay over any tax under Article 28 in a timely manner. During the period in issue, Tax Law § 1145(a)(1)(iii) further provided that if the failure or delay was due to reasonable cause and not willful neglect, penalty and that portion of interest which exceeds the minimum amount of interest prescribed by law shall be remitted.

B. That during the period in issue, 20 NYCRR former 536.5(b) provided:

"Reasonable cause. In determining whether reasonable cause exists for waiving interest or penalties, the taxpayer's previous compliance record may be taken into account. Reasonable cause must be affirmatively shown by the taxpayer in a written statement. Grounds for reasonable cause, where clearly established, may include the following:

- (1) death or serious illness of the taxpayer, a responsible officer or employee of the taxpayer, or his unavoidable absence from his usual place of business;
- (2) destruction of the taxpayer's place of business or business records by fire or other casualty;
- (3) timely prepared returns misplaced by the taxpayer or a responsible employee of the taxpayer and discovered after the due date;
- (4) inability to obtain and assemble essential information required for the preparation of a complete return despite reasonable efforts;
- (5) pending petition to the Tax Commission or formal hearing proceedings involving a question or issue affecting the computation of tax for the year, quarter, month or other period of delinquency; or
- (6) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause."

C. That the evidence presented does not establish that petitioner's failure to comply with the Tax Law was due to reasonable cause and not willful neglect. First, since petitioner's manager was not responsible for the preparation of the sales tax returns, petitioner has not shown how the unexpected departure of the manager caused a delay in the filing of the return for the

period ending November 30, 1985. Second, petitioner has not shown that there was an "inability to obtain and assemble essential information" within the meaning of 20 NYCRR former 536.5(b)(4). Although the bookkeeper may have been unavailable when the sales and use tax return was due, petitioner has neither alleged nor shown that the books and records necessary to prepare the return were inaccessible to the treasurer. The distance between the treasurer's office and the business may not be regarded as an inability to obtain records. It is noted that petitioner's treasurer was able to visit the business premises about a month later to prepare the tax return. Petitioner's argument that it was not required to file sales and use tax returns with respect to those months it was not conducting business is also without merit. The frequency with which a taxpayer is required to file is dependent upon the level of sales and use tax due in each of the preceding four calendar quarters (20 NYCRR 533.3[b],[d]). Here, petitioner's filing record reflects a disregard of the requirement to file timely sales and use tax returns (Tax Law § 1136[b]). Lastly, the Audit Division properly assessed penalty regardless of petitioner's Tax Amnesty Application since the tax amnesty program only applied to tax liabilities arising prior to January 1, 1985 (20 NYCRR 2005.1 [b], 2500.3).

D. That the petition of Thousand Island Club, Inc. is denied and the Notice and Demand for Payment of Sales and Use Taxes Due, dated May 5, 1986, is sustained.

DATED: Albany, New York  
May 5, 1988

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ADMINISTRATIVE LAW JUDGE